United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1134

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee-Plaintiff,

v.

EDWARD CARLTON,
Appellant-Defendant.

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

Preliminary Statement

Defendant Carlton was arrested, along with 2 co-defendants, on February 4, 1975 for his participation in a bank robbery. He was indicted by a Federal grand jury on 2/6/76 in a 5 count indictment alleging violations of 18 USC §2113 (a), §2113 (b), §2113 (d) and 18 USC §371. After various motions brought by the defense were argued and decided upon by the court, trial commenced January 22, 1976. When the jury could not reach a verdict, the judge the Honorable John T. Curtin, declared a mistrial and discharged the jury. The second trial commenced February 24, 1976 with the jury reporting guilty verdicts on all counts.

Defendant was sentenced on March 15, 1976 to a term of up to 10 years on the first 3 counts and a term of five years on the conspiracy court, the sentences to run concurrently.

Statement of Facts

On February 4, 1975 at approximately 10:55 a.m. the Niagara Falls Police Department received a call advising them that the Manufacturers and Traders Trust Company branch at Portage Avenue and East Falls Street had been robbed. The report indicated that the robbers had escaped in a blue vehicle, license No. 673 ZAX (Defendant's Appendix p. 41). Officer Robert Gee, a patrolman assigned to the neighborhood where the bank was located, heard the report over the radio in his patrol car. Having been assigned to that area for four years, he had never known a local inhabitant to use a vehicle in the commission of a crime; he therefore deduced that the robbers had come from outside the area (Government's Appendix pp. 74F-G). He stationed himself on Pine Avenue (Defendant's Appendix p. 42), and radioed another car to station itself on Military Road (Defendant's Appendix p. 44), these being the two major exits from the area. A series of broadcasts followed, each providing Officer Gee with a more specific description of the robbers and the getaway car (Defendant's Appendix pp. 44-47).

Subsequently it was reported over the radio that the robbers had been sighted leaving their escape vehicle (which by then had been described as a rental vehicle from Cheektowaga) and had been joined by a Negro woman (Defendant's Appendix pp. 45-46). A description of the second woman followed.

A suggestion was broadcast over the radio that the suspects might try to leave the city by cab (Defendant's Appendix p. 46). All of these transmissions were heard by Officer Gee and shortly thereafter he spotted a LaSalle taxicab leaving the city on Pine Street, containing three passengers, a Negro male and two Negro females. As he followed the cab, he radioed police headquarters for another description of the robbery suspects

(Defendant's Appendix p 47); the description he received matched that of the passengers in the cab. He noticed that as he was following the cab, each of the three passengers repeatedly turned and watched him (Government's Appendix pp. 66-67). Officer Gee called in his report, that he was in pursuit of the cab carrying three individuals who matched the description of the robbery suspects, and requested assistance (Defendant's Appendix p. 48). He stopped the cab and asked the driver to speak with him inside his patrol car (Defendant's Appendix p. 48). The cab driver confirmed the description of the passengers and also reported that he had picked up the three in the same area where the escape vehicle had been found abandoned (Defendant's Appendix p. 48).

Officer Gee approached the cab, by this time joined by Officers Arber and Burek (Government's Appendix p. 70), who had responded to his call for assistance. Observing again that the three occupants matched the broadcast description of the robbery suspects, Officer Gee ordered the three out of the cab and placed them under arrest.

Officers Gee and Burek looked through the open door of the cab and saw a black attache case protruding from under the rear portion of the front seat and a plastic bag on the rear seat of the cab (Government's Appendix p. 71). Officer Gee leaned into the cab and opened the case, finding a large amount of money stacked in 5, 10 and 20 dollar bills (Government's Appendix p. 73). The plastic bag contained articles of clothing (Government's Appendix p. 72). The suspects were taken back to the bank for identification and then turned over to the F.B.I.

At the bank the three were identified as Edward Carlton, Sandra Soles, and Deborah Ann Smith; Ms. Soles was positively identified by a bank employee. The suspects were warned of their *Miranda* rights by Agent Davidson of the

F.B.I. Then Carlton and Ms. Smith were turned over to the F.B.I.; Ms. Soles, who was a minor, was taken to the Niagara Falls Police Department. After a discussion at the Niagara Falls Police Department, where she fully confessed to her participation in the robbery (Government's Appendix p. 51), Ms. Soles accompanied Det. Clute, Lt. Zacarella, and Special Agent Ahart of the F.B.I. to an apartment building where she and the other defendants had met that morning prior to the robbery (Government's Appendix p. 16). Det. Clute and Lt. Zacarella entered the building through a common doorway and proceeded to a second floor apartment, in hopes of finding Ms. Dorothy Goldsmith the lessee of that apartment. Determining that Ms. Goldsmith was not at home, Lt. Zacarella quickly checked the rest of the building for her. In the basement of the building Lt. Zacarella noticed a semi-transparent plastic bag which appeared to include red slacks among its contents (Government's Appendix p. 52). He ripped the bag open finding, along with other garbage, a gun and clothing; these were identified by Ms. Soles as having been used by herself and defendant Carlton during the robbery.

At F.B.I. Headquarters, Defendant Carlton was advised of his rights by Special Agent Davison, and asked if he wished to make a statement. Carlton replied, "I ain't got nothing to talk about," and the interview was ended (Government's Appendix p. 8). There was some delay before Carlton could be taken before the Magistrate for arraignment, and Agent Gary DiLaura was assigned to guard Carlton during this time. DiLaura and Carlton engaged in general conversation—the weather, how Carlton was feeling, where he was employed, etc. (Government's Appendix p. 78). The conversation evolved to a mention of money, Carlton complaining about not having much. DiLaura responded asking the defendant whose money had been found inside the taxicab. Carlton said it was his and in response to DiLaura's question where he had

gotten the money Carlton replied that he had won it gambling. When DiLaura asked, "How do you explain . . . some of it is prerecorded bills from the bank robbery," Carlton responded, "Well bank robbing is a gamble." (Government's Appendix p. 78).

DiLaura stated that in walking by the interview room he had heard Carlton being informed of his rights (Government's Appendix p. 80) but that he had not heard Carlton's response to those statements (Government's Appendix p. 81). DiLaura made no attempt to re-inform Carlton of his rights at any time during the course of this conversation (Government's Appendix p. 85).

On December 15, 1976, prior to trial, defendant filed a motion *pro se* for dismissal of the charges against him, alleging a denial of his right to a speedy trial under the United States Constitution and the Federal Speedy Trial Act (18 U.S.C. Chapter 208). In support of his motion to dismiss, defendant alleged the following: that more than 90 days had passed from his arrest and he had not yet been brought to trial, and that he had been incarcerated in the Erie County Holding Center since February 4, 1975. Defendant's motion for dismissal was denied on December 29, 1975.

On the second day of trial, defendant's counsel reported to the court that his client claimed to have been seen in the custody of the Marshals by one or two of the jurors and moved for a mistrial on grounds of prejudice (Defendant's Appendix p. 81). Although counsel made no attempt to demonstrate that the incident had in fact occurred, the court offered to charge the jury with regard to the incident (Defendant's Appendix p. 81). Counsel refused the court's offer, and the court denied defendant's motion for a mistrial (Defendant's Appendix p. 83).

Prior to trial, defendant moved that, should he take the stand, the government be precluded from cross-examining

him with respect to his prior criminal record. The court granted the motion with respect to a 1964 conviction for bank robbery but denied the motion with respect to a 1970 bank robbery conviction for violation of 18 U.S.C., § 2113(b). Defendant renewed his motion with respect to this conviction at the close of trial (Defendant's Appendix p. 87), and it was again denied (Defendant's Appendix p. 90).

POINT I

There was probable cause for the arrest of defendant Carlton.

Under both Federal Law and New York Statute it is well settled that a warrantless arrest for a felony is valid if based upon probable cause. *Henry v. United States,* 361 U.S. 98 (1959), N.Y. Criminal Procedure Law, § 140.10 1(b) (McKinney 1971). There is probable cause for arrest when the facts and circumstances known to the arresting officer are sufficient to warrant a prudent man in believing that an offense has been committed. *United States v. Edmonds,* .... F.2d ...., (2d Cir. May 7, 1976), Slip Op. 3560. The question of whether the defendant was lawfully arrested, then, will depend upon whether Officer Gee reasonably believed that the defendant had in fact committed this robbery. An examination of the facts known to Officer Gee prior to the arrest clearly indicates that sufficient probable cause existed to sustain the arrest.

In the twenty-five minutes between the first report of the robbery of the M & T Bank on Portage Avenue and the time Officer Gee stopped a LaSalle Company taxicab in which the defendant was riding, sufficient information had been transmitted over the police radio, and received by Officer Gee to enable him to reasonably conclude that defendant had participated in the bank robbery.

The first radio call informed all officers that the M & T Bank at Portage and East Falls Streets had been robbed by two Negro males who escaped in a blue car, license plate number 673ZAX. Officer Gee immediately responded to the call indicating that he would station himself on Pine Avenue, a main traffic artery and possible escape route. Shortly thereafter, a further description of the suspects was broadcast indicating that the robbery had been committed by a Negro

male and a Negro female: "All cars, additional info on that armed robbery at M & T Portage and East, there was a Negro male and a Negro female. A handgun was used, description Negro male had ski mask. Black pants and dark colored pea coat . . . he was tall and slender . . . description of female involved wore a long plaid coat, and red slacks. Late teens early twenties and was light skinned." (Defendant's Appendix p. 44).

A subsequent broadcast indicated that the escape vehicle had been abandoned and that a third individual was involved in the robbery, a female. A description followed: "They stated that the third party was a woman about 5'3" heavy set, wearing a checkered coat. Early twenties . . . You might check with the cab company see if they made a pick-up in that area." (Defendant's Appendix p. 46).

Thus within twenty minutes of the robbery Officer Gee was apprised of the following: (1) that three black individuals, one male, two females had been involved in the bank robbery; (2) that the Negro male was tall and slender; one female was light skinned and in her late teens or early twenties; the other female was heavy set and about 5'3" in height; (3) that the suspects had abandoned their escape vehicle at the 13th Street school; and (4) that an attempt might be made to leave the city by taxi.

From his post on Pine Avenue, Officer Gee observed a cab heading away from the city with three passengers matching the broadcast descriptions. His suspicions aroused, Officer Gee followed the cab for 3 or 4 minutes, during which time the occupants frequently turned and watched him through the rear window. The facts gleaned from the broadcast plus Officer Gee's own observations provided him with a reasonable basis for belief that the individuals in the cab had participated in the robbery, thus providing him with probable cause for arrest. *United States ex rel. Williams v. LaVallee*, 415 F.2d 643

(2d Cir. 1969), *cert. denied* 397 U.S. 999; *United States ex rel. Wilson v. LaVallee,* 367 F.2d 351 (2d Cir. 1966); *United States v. Cox,* 464 F.2d 937 (6th Cir. 1972). At the very least, it provided the justification for an investigative stop of the cab. *Terry v. Ohio,* 392 U.S. 1 (1967); *Whitely v. Warden,* 401 U.S. 560, 568; *United States v. Jackson,* 448 F.2d 963 (2d Cir. 1971), *cert denied, Willis v. United States,* 405 U.S. 924 (1972).

When Officer Gee stopped the cab he proceeded cautiously. He spoke with the cab driver in his patrol car who verified the description of the suspects. The driver further reported that he had picked up these individuals in the 300 block of 14th Street, the same area where the abandoned vehicle was located and where three people fitting this description were sighted. Only then, armed with additional information which, when added to the facts already known to Officer Gee, clearly established probable cause, did Officer Gee approach the vehicle, and take custody of the suspects.

It is clear that the concerns of the Supreme Court in *Whitely v. Warden, supra,* cited by defendant in his brief (p. 12), are not present in this case. In *Whitely,* an arrest warrant was issued without probable cause. The County Sheriff subsequently issued a state wide radio broadcast describing the subjects of the warrant and requesting the assistance of other law enforcement agencies in apprehending them. Officers in another part of the state, responding to the bulletin, stopped, arrested and searched the defendants. The court held that there was no probable cause for the officers to arrest defendants, since the broadcast was not issued based on facts which established probable cause and the officers did not observe other facts sufficient to give them probable cause. In the instant case Officer Gee's actions were based on facts from the radio broadcast which, if not themselves sufficient to establish probable cause were certainly sufficient when combined with Officer Gee's own observations.

Further, the concerns of this court expressed in *United States ex rel. Mungo v. LaVallee,* 522 F.2d 211 (2d Cir. 1975) are not present in this case. In *Mungo,* the police broadcast upon which probable cause for arrest was claimed, was based upon information whose source was unknown to the arresting officers and unknown to the police at the time of the suppression hearing. In the instant case the broadcast itself reveals the sources of the information received by the police: the initial descriptions were given by eyewitnesses to the robbery; the description of the escape vehicle and the three individuals seen near the vehicle was provided by two gas company employees. This information was received by Officer Gee over the police radio prior to his sighting of the cab.

The defendant argues that the government did not sustain its burden of proving that probable cause existed to arrest him, since neither the gas company employees nor the eyewitnesses to the robbery were called to testify at the suppression hearing (Defendant's brief, pp. 12-13). Defendant cites no federal authority for this proposition, but a New York Court of Appeals case, *People v. Lypca,* 36 N.Y. 2d 210 (1975). Defendant implicitly argues that under the authority of *U.S. v. DiRe,* 332 U.S. 581 (1948), federal courts must look to New York case law to determine whether probable cause exists to sustain an arrest. This is clearly a misreading of the holding in *DiRe.* The Supreme Court there held that since "no act of Congress lays down a general rule for arrest without warrant for federal offenses," *DiRe, supra,* at 591, that such authority must be found in the New York statute. In New York Criminal Procedure Law § 140.10 1 (b) (McKinney, 1971) a felony arrest without warrant is authorized when based upon probable cause There was probable cause for the arrest in this case, thus the arrest was a proper one. Defendant's reliance on *People v. Lypca, supra,* is therefore misplaced.

POINT II

The warrantless search of the cab was proper.

A. The search was justified as incident to a lawful arrest.

The warrantless search of an individual and the area under his immediate control is lawful when conducted incident to a lawful arrest. *Chimel v. California,* 395 U.S. 752 (1969). It has long been recognized that under certain circumstances it is unreasonable to expect an officer to obtain a warrant prior to a search. The exigent circumstances surrounding many arrests justify the officer's need to quickly locate and seize weapons and/or destructible evidence. *Preston v. United States,* 376 U.S. 364, 367 (1963).

In the instant case the arresting officer had removed the suspects from the taxicab, and taken them into custody. Immediately thereafter Officer Gee looked into the cab and saw (in plain view) a black attache case protruding from under the front passenger's seat and a pink plastic bag lying on the rear seat of the cab. Officer Gee and another officer leaned into the cab, released the locks on the attache case and discovered a large quantity of money in $5, $10, and $20 bills. The pink plastic bag contained articles of clothing including a ski mask. There can be no doubt that the search in the instant case was contemporaneous with the arrest and that the articles seized had been within the immediate reach of the arrestees. Durationally and spacially limited searches are not unreasonable when made incident to arrest. *Chimel, supra; Stoner v. California,* 376 U.S. 483, 486 (1963); *Preston, supra.*

This court has held that the fact that the suspects had been taken into custody prior to the search, does not alter the analysis that the search and seizure of articles incident to lawful arrest is reasonable under the Fourth Amendment. *United States v. Tramunti,* 513 F.2d 1087, 1104 (2d Cir. 1975); *United*

States ex rel. Williams v. LaVallee, supra at 646. Thus, contrary to the defendant's argument, the fact that the three suspects here had been removed from the cab is of no effect.

Moreover, the Supreme Court held in *United States v. Edwards*, 415 U.S. 800 (1974) that arresting officers may properly take to examine and preserve the personal effects of an arrestee upon lawful arrest.

Certainly the arresting officer was not expected to leave the arrestees' personal effects in the taxicab while taking the arrestees back to the scene of the crime for positive identification. Rather, under the *Chimel* rationale or the *Edwards* rationale Officer Gee was justified in seizing the attache case and the plastic bag.

This court has further held that seizing and opening an attache case in an arrestee's possession is not unlawful if incident to a lawful arrest. *United States v. Lam Muk Chiu*, 522 F.2d 330 (1975), *United States v. Edmonds, supra.*

B. The search was justified under the "automobile exception".

When a search takes place in a motor vehicle the Supreme Court has recognized an exception to the general warrant requirement for searches and seizures. An automobile may be searched without a warrant, if the officer has "probable cause to believe that the car contains articles the officer is entitled to seize." *Chambers v. Maroney*, 399 U.S. 42 (1970); *Carroll v. United States*, 267 U.S. 132 (1925); *Cardwell v. Lewis*, 417 U.S. 583 (1974).

The exception is generally justified on two grounds: the specific exigent circumstances generally associated with moving or moveable vehicles (*Chambers, supra*, at 50-51) and the lesser expectation of privacy one generally has in a motor vehicle (*Cardwell, supra*, p. 590).

In the instant case the arresting officer had probable cause to believe that the cab was then being used to effectuate an escape from the bank robbery. Furthermore, Officer Gee had probable cause to believe that the vehicle would contain fruits, instrumentalities, or evidence of that bank robbery. Thus, as is often the case, the same circumstances which justified the arrest also furnished probable cause to search the cab. *Chambers, supra,* at 47-48.

Further, where as here, the officer had probable cause to believe that the articles seized were "closely related to the reason the suspects were stopped and arrested" the search has been held non-violative of the Fourth Amendment. *United States v. Tramunti, supra.*

POINT III

The articles found in a garbage bag in the basement of an apartment building at 320 14th Street were properly seized.

A short time after the apprehension of the defendants in this case, Agent Ahart, Detective Clute and Lt. Zacarella accompanied by co-defendant Sandra Lynn Soles went to an apartment building at 320 14th Street in search of Dorothy Goldsmith who lived in an apartment in that building and who had been implicated in the conspiracy by Ms. Soles. When there was no answer at Ms. Goldsmith's apartment, Lt. Zacarella quickly looked in the remainder of the building for her, including the basement. At the bottom of the basement steps he discovered a semi-transparent plastic garbage bag which appeared to contain red slacks. He remembered that Ms. Soles had earlier stated that the clothes she had worn in the robbery (red slacks and a jacket) were placed by defendant Carlton in a garbage bag. Lt. Zacarella ripped open the bag which contained along with other garbage the clothes worn by defendants Soles and Carlton and the gun used by them in the robbery. The seizure of the clothes and gun is challenged by defendant in this appeal as violative of his rights under the Fourth Amendment.

A. Defendant abandoned the seized articles.

It is well established that a search or seizure of abandoned property does not violate the Fourth Amendment. *Abel v. United States*, 362 U.S. 217, 241. In determining whether a given article has been abandoned, two tests have been looked to by the courts: (1) whether there was an intent to relinquish possession on the part of the possessor, *United States v. Cowen*, 396 F.2d 83 (2d Cir. 1968), and (2) "Whether the complaining party retains a reasonable expectation of privacy in the articles alleged to have been abandoned". *United States v. Wilson*, 472 F.2d 901 (9th Cir. 1972).

Under the first test defendant can certainly be said to have abandoned the articles seized. If Carlton's "throwing the articles away,"[1] by placing them in Dorothy Goldsmith's garbage did not in itself demonstrate intent to relinquish possession, then certainly when he took the garbage out of the privacy of Dorothy Goldsmith's apartment and left it in the basement of the apartment building he can be said to have demonstrated such intent. *Abel, supra; Dzialek, supra.*

Further, Carlton's actions in throwing the articles away meet the second test for abandonment, for if he ever had a reasonable expectation of privacy in Dorothy Goldsmith's garbage, he lost it when he removed the garbage from her apartment to the basement, for the common areas of an apartment building are not areas protected by the Fourth Amendment. *United States v. Miguel,* 340 F.2d 812 (2d Cir.), *cert. denied* 382 U.S. 859 (1965). In this case the entrance of the building was unlocked, the door to the basement was open and the garbage bag was in plain view on the basement floor. While the Supreme Court has held that what an individual "seeks to preserve as private even in an area accessible to the public, may be constitutionally protected," *Katz v. United States,* 389 U.S. 347, 351 (1967), there can be no claim that Carlton here attempted to reasonably preserve his privacy interest in these articles. A person who sought to keep something private would not put it in a semi-transparent plastic bag nor would he leave it open to view in a common area of an apartment building. Under either definition then, defendant abandoned these articles.

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[1] It has been suggested, however, that throwing articles away may alone be a sufficient demonstration of intent to abandon them. See, *e.g., United States v. Dzialek,* 441 F.2d 212; *Abel v. United States, supra.*

B. Defendant Carlton has no standing to challenge this seizure.

Having abandoned the seized articles, defendant Carlton has no standing to challenge their seizure. Courts have traditionally held that to establish standing to challenge a search and seizure, an individual must establish an interest in the premises searched or the goods seized. *Jones v. United States*, 362 U.S. 257 (1960); *Simmons v. United States*, 390 U.S. 377, 389 (1968).

In *Brown v. United States* the court reviewed criminal standing requirements in holding that a defendant had no standing to challenge the seizure of stolen goods from the premises of a co-conspirator. The court suggested that there is generally no standing where defendants:

(a) Were not on the premises at the time of the search and seizure,

(b) Had no proprietary or possessory interest in the premises, and

(c) Were not charged with an offense which includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure. 411 U.S. 223, 229 (1973).

In the instant case, defendant has no interest in the premises searched. He lost his possessory interest in the articles seized when he abandoned them. He was not charged with an offense which includes possession as an essential element nor was he on the premises at the time of the search. He therefore has no standing to challenge this search and seizure under the Fourth Amendment.

POINT IV

The admission by defendant was voluntary, and the trial judge's failure to exclude it was not error.

In determining whether statements made by a defendant in custody are admissible, the issue is whether such statements were made voluntarily. 18 U.S.C. § 3501(a). In determining the issue of voluntariness a trial judge is required to consider "all the circumstances" surrounding the making of the statement. 18 U.S.C. § 3501(b).

Taking into consideration all of the surrounding circumstances, the statement by defendant was clearly voluntary. Carlton had been informed of his *Miranda* rights twice; Special Agent Davison first advised defendant of his rights at the bank (where defendant had been returned for identification), and thereafter repeated the warnings at F.B.I. Headquarters. Defendant responded to the questioning by F.B.I. agents by saying, "I ain't got nothing to talk about." He thus indicated an awareness of his rights and his desire not to make a statement, and the agents ceased their questioning of him. Agent DiLaura, who was assigned to watch Carlton until he should be taken to the Magistrate and arraigned, engaged in general conversation with the defendant. The topic of conversation turned to money, Carlton complaining that he didn't have any. DiLaura asked him whose money was found with him in the taxicab; Carlton said it was his, that he had won it gambling. When asked how he could have won the money gambling when some of it was prerecorded bait money from the bank robbed earlier that day, Carlton responded, "Well, bank robbing is a gamble." The admissions made by Carlton in this conversation were admitted against him at trial and are challenged here by defendant as improperly admitted.

It is significant to note here that defendant's admissions were not the product of a formal custodial interrogation, but

of general conversation between Agent DiLaura and defendant. ". . . (The) rule against deliberately eliciting incriminating statements from defendant by direct and surreptitious means does not apply to spontaneous or voluntary statements made by defendant in the presence of government agents." *United States v. Garcia,* 377 F.2d 321 (2d Cir.), *cert. denied* 389 U.S. 991 (1967).

Further, even if this is to be characterized as "interrogation", it is clear that an indication by a defendant of a desire to remain silent does not bar all subsequent questioning. *Michigan v. Moseley,* 18 Cr.L. 3017, ... U.S. ..... (1975); *United States v. Collins,* 462 F.2d 792 (2d Cir. 1972) *cert. denied* 409 U.S. 988. In *Smith v. United States,* 505 F.2d 824 (6th Cir. 1974) the court held that although generally interrogation must cease when an accused indicates that he wishes to remain silent, "the police may consider interrogation into any subject area the subject is willing to talk about;" *Smith,* at 829. The court further stated that a trial court "must carefully scrutinize the circumstances to determine that the police did not use subterfuge to extract information about matters relating to subjects the accused did not wish to discuss." *Smith,* at 829.

There was no "subterfuge" involved here. Carlton's admissions, though made in response to Agent DiLaura's questions, were spontaneous and deliberate. Carlton refused to explain his remarks when asked to do so by DiLaura; he was thus as aware of his rights when he made the statement as he was 30 to 45 minutes earlier when he refused to waive them.

It is argued by defendant that in the absence of a third set of *Miranda* warnings his conversation with Agent DiLaura should have been excluded from evidence. Certainly when a lengthy interval separates two interrogation sessions, a defendant should be rewarned of his rights. But when only 30 or 45

minutes has passed since the issuance of the warnings, a fresh set of warnings is not required. In *United States v. Collins, supra,* defendant at the outset of his interview refused to talk but was later persuaded to confess; having been given his *Miranda* warnings at the outset of the interview, a fresh set of warnings was not required prior to his confession.

In consideration of all the circumstances, therefore, the statements made by defendant were voluntary and were properly admitted at trial.

POINT V

Defendant's motion for mistrial was properly denied.

Defendant raised the possibility that one or two of the jurors had seen him in the custody of the Marshals during a recess in the trial, and moved for a mistrial on the ground of prejudice. Defendant now claims that the trial judge should have granted an evidentiary hearing to determine whether any prejudice could have resulted from this alleged incident, rather than denying defendant's motion for mistrial.

It should first be noted that while it cannot be said that no prejudice results from an incident such as this, *United States v. Torres*, 519 F.2d 723 (2d Cir. 1975), generally a showing of prejudice is required for a mistrial to be granted. *United States v. Torres, supra; United States v. Chrzanowski*, 502 F.2d 573 (3d Cir. 1974); *United States v. Leach*, 429 F.2d 956 (8th Cir. 1970), *cert. denied* 402 U.S. 986; *United States v. Hopkins*, 486 F.2d 360 (9th Cir. 1973). Here, counsel not only failed to show any prejudice to defendant, he failed to demonstrate that the incident in fact occurred, or that any juror saw defendant, *Yates v. United States*, 362 F.2d 578, 579 (10th Cir. 1966); the court therefore, was fully justified in denying his motion for mistrial.

Further, the trial judge here offered counsel a remedial instruction, which counsel refused. Defendant did not request an evidentiary hearing nor any other type of relief, other than the motion for mistrial. Had defendant claimed, on this appeal, that the trial judge should have charged the jury with this alleged incident his claim would have been precluded, since he did not request such a charge at trial. *United States v. Coughlin*, 514 F.2d 904 (2d Cir. 1975); *United States v.*

Hopkins, supra; United States v. Figueroa-Espinoza, 454 F.2d 590 (9th Cir. 1972). Similarly he should be considered to have waived his right to a evidentiary hearing and is precluded therefore from raising on this appeal the issue of whether such a hearing should have been granted.

POINT VI

The defendant was not entitled to a charge with respect to the government's failure to call Dorothy Goldsmith as a witness.

Defendant argues that as a result of the government's failure to call Dorothy Goldsmith he was entitled to a charge that the jury could infer that Ms. Goldsmith's testimony would have been unfavorable to the government. The trial judge ruled that if defendant commented on the government's failure to call Ms. Goldsmith that the government could comment on the defense's failure to call her as well. This was clearly a correct statement of the law. *United States v. Stofsky,* 527 F.2d 237 at 249 (2d Cir. 1975). The trial judge properly denied defendant's request for charge as well, for "no such inference is permissible where the evidence is equally available to either party". *United States v. Johnson,* 467 F.2d 804, 808 (1st Cir. 1972), *cert. denied* 410 U.S. 909. Generally "availability" refers to a party's physical ability to compel a witness to testify. *U. S. v. Stofsky, supra;* however, even under the definition of availability employed by the court in *Johnson, supra,* (that is, availability of a witness should be determined on the basis of his disposition and relationship toward the parties,) Dorothy Goldsmith was equally available to both sides in this case. Clearly, therefore, defendant was not entitled to a charge based upon the government's failure to call her.

Further, the trial judge stated in his ruling that it was "questionable" (Defendant's Appendix, p. 86) whether Ms. Goldsmith could add anything to what was already put into evidence by the government, having not been present at the robbery. "There is a general limitation that the inference cannot fairly be drawn except from the non-production of a wit-

ness whose testimony would be superior in respect to the facts to be proved." *II Wigmore, Evidence* Section 288, at 171 (3rd Ed. 1940); *United States v. Tyers*, 487 F.2d 828 (2d Cir. 1973); *United States v. Llamas*, 280 F.2d 392, 393 (2d Cir. 1960). The conflict in Ms. Goldsmith's potential testimony to which defendant points has no bearing on his participation in the robbery. Rather, the statements made by Ms. Goldsmith were an attempt to diminish her own responsibility in the robbery. The trial judge, therefore, properly concluded that Ms. Goldsmith's testimony would only have been cumulative (if in fact she could have added anything at all) on the issue of defendant's participation in the robbery, and the judge's ruling that defendant was not entitled to a charge based upon the government's failure to call Ms. Goldsmith was also proper.

POINT VII

The trial judge's decision to permit the government to cross-examine defendant with respect to a prior conviction was not an abuse of discretion.

Federal Rule 609(a)(2) provides that the credibility of a witness may be attacked by evidence that the witness has committed a crime involving dishonesty or false statement. It is widely recognized that crimes of stealing involve dishonesty and thereby reflect on the credibility of an accused as a witness. *United States v. Puco,* 453 F.2d 539 (2d Cir.) *cert. denied* 414 U.S. 844 (1971); *Gordon v. Unitea States,* 383 F.2d 936, 940 (D C. Cir.) *cert. denied* 390 U.S. 1029 (1967); *United States v. Palumbo,* 401 F.2d 270 (2d Cir.) *cert. denied* 394 U.S. 947 (1968). Defendant's claim that the prior conviction would have had little probative value on the issue of defendant's credibility is, therefore, without merit.

It is well established that the decision to refuse to restrain cross-examination of defendant on his prior record is well within a trial judge's discretion. *United States v. Nagelberg,* 434 F.2d 585 (2d Cir.) *cert. denied* 401 U.S. 939 (1970). *Nagelberg, supra,* also characterized the trial judge's power to restrain such cross-examination as narrowly confined, citing *U. S. v. Palumbo, supra. Palumbo* held that "a trial judge may prevent such use, if he finds that a prior conviction negates credibility only slightly but creates a substantial chance of unfair prejudice." The court suggested that a forty year old conviction for rape in a counterfeiting trial would fall afoul of its standard, *Palumbo, supra,* p. 274, the conviction being ancient, having no bearing on veracity, and possessing a substantial risk of prejudice. In the instant case the conviction was recent (from 1970), and was for a crime which bears directly on veracity.

While some prejudice is unavoidable when a defendant's credibility is impeached by a conviction for the same crime as that for which he is presently on trial, the probative value of the prior conviction has been held to outweigh any possibly prejudicial effect where the crime reflects on an accused's veracity. *United States v. Isaac*, 449 F.2d 1040 (D.C. Cir. 1971); *United States v. Garber*, 471 F.2d 212, 216 (5th Cir. 1972); *United States v. Falco*, 278 F.2d 1376 (9th Cir. 1972); *United States v. Dilorenzo*, 429 F.2d 216 (2d Cir.), *cert. denied* 402 U.S. 950 (1970).

United States v. Puco, supra, does not require a different result. *Puco, supra*, refuses to permit the defendant's credibility to be impeached by evidence of a 21 year old narcotics conviction at a trial on a narcotics charge. The court in *Puco, supra*, specifically found there, however, that a "narcotics conviction has little bearing on veracity." That is not the case here; the prior conviction bearing directly on veracity, the trial judge's decision to permit cross-examination with respect to that conviction was not an abuse of discretion.

POINT VIII

Defendant was not denied a speedy trial.

The docket entries and the record reflect that the proceedings involving defendant Carlton were held as follows:

Carlton was arrested on February 4, 1975; his initial appearance before the magistrate was held the same day. The Grand Jury indicted defendant on February 6, 1975. Defendant was arraigned on February 10th; at that time a schedule was set for the filing of discovery motions. Defendant Carlton filed his discovery request on February 18th; on February 25th, the date the government's response was due, the government requested and received a one week adjournment; the government subsequently filed its response on March 7th. Oral argument was heard on the discovery motions on March 18th; at that time, defendants asked for the right to make additional motions. The request was granted by the magistrate who ordered these motions filed by April 15th. On April 10th, Carlton's co-defendants filed motions attacking the procedures for selecting grand jurors; although the record is not clear when, these motions were later joined in by defendant Carlton. Subsequently a decision was rendered on defendants' discovery motions, and on April 30th, the government filed a notice of readiness for trial. On May 19th, the Court acknowledged receipt of the 3 defendants' motions with respect to the composition of the Grand Jury, and asked the government to respond by June 30th. The government filed its response on July 3rd. Following the filing of reply briefs by the co-defendants and the government's response, the Court held oral argument on August 14th, and denied the motion in all respects. On that day, because defendant Carlton was in custody, the Court set a firm date for the suppression hearing of September 17th. The suppression hearing commenced September 17th; it continued September 19th and

23rd, and concluded October 1st. Defendants requested the right to file briefs on the suppression issues at the conclusion of the suppression hearing, and the court scheduled a meeting for October 8th. On October 8th, the Court held a pre-trial conference; defendants requested a transcript of the suppression hearing, and the Court scheduled November 24th as the due date for the government's and defendants' briefs. The government filed its brief on November 24th; on November 26th, when defendants' briefs were not filed, the Court notified defendants that they had until December 8th to file. Defendants' brief was filed December 9th. On December 15th, defendant Carlton filed a *pro se* motion to dismiss for denial of a speedy trial, returnable December 22nd; the government filed its response on December 16th. On December 19th, the Court heard oral argument on the suppression motion. On December the Court heard argument on Carlton's motion to dismiss; the Court denied the motion and scheduled trial for January 21st. On January 14th the Court rendered its decision on the suppression motion. On January 19th co-defendant Smith plead guilty and agreed to testify; on January 21st, co-defendant Goldsmith plead guilty. The first trial commenced January 22, 1976, and following a mistrial due to a hung jury, a second trial commenced February 24, 1976.

Defendant argues that his motion to dismiss was improperly denied. It should first be noted that defendant, in his *pro se* motion requested the wrong relief. Carlton alleged in his petition that 90 days had passed since his arrest and, since he had not been brought to trial, the charges pending against him should be dismissed. Under Rule 3 of the Second Circuit Rules Regarding the Prompt Disposition of Criminal Cases, and the Interim Plan of the Western District of New York Pursuant to the Provisions of the Speedy Trial Act of 1974, the remedy for a defendant in custody under these cir-

cumstances is release from custody, not dismissal of the indictment.[2]

Further, under either the Interim Plan or the Second Circuit Rules, defendant was not entitled to dismissal of the indictment. The Second Circuit Rules provide that "the government must be ready for trial within 6 months from the date of arrest . . ." (Rule 4). In this case, the government filed its motion of readiness for trial on April 30, less than 3 months from the date of defendant Carlton's arrest; there was, therefore, no denial of a speedy trial under the Second Circuit Rules.

Similarly, under the Interim Plan, to survive a motion to dismiss, the government is required to be ready for trial within 6 months from the date of defendant's arrest (Rule 5). The government having filed its notice of readiness for trial on April 30th, there can be no claim that the government failed to abide by the standards set forth in the Interim Plan.

Further, it is clear that most of the delay from arrest until trial was caused by the defendants' numerous pretrial motions. Defendant made extensive discovery requests which required time to answer. Defendants challenged the manner of selection of grand jurors, a complex issue which required time to prepare briefs and argument. Finally, defendants moved to suppress numerous items from evidence, a motion which required a lengthy suppression hearing and time to prepare briefs and oral argument. Both the Second Circuit rules and the Interim Plan provide that the period of delay while pretrial motions are pending should be excluded in computing the time within which the government should be ready for trial (Second Circuit Rules, Rule 5; Interim Plan

[2] It is questionable whether Carlton would have been entitled to release from custody either. See, *U.S. v. Martinez*, ... F2d ....., Slip Op. 4019 (2nd Cir. June 4, 1976).

Rule 6). Defendant's motion to dismiss, therefore, was properly denied.

Defendant's constitutional claim should be denied. In *Barker v. Wingo,* 407 U.S. 514 (1972) the Supreme Court identified four factors to be examined in determining whether a criminal defendant has been denied a speedy trial; these are:

1. Length of the delay,
2. Reason for the delay,
3. Whether the defendant asserted his right,
4. Whether there has been any prejudice to the defendant. (*Barker, supra,* at 530).

The court further held that there was no need to look at the other three factors unless the length of the delay was "presumptively prejudicial." *Barker, supra,* at 530. Where so much of the year's delay from defendant's arrest until trial was consumed by motions made by defendant, he is hardly in a position to argue that that delay was "presumptively prejudicial." Further, defendant, in his brief, makes no showing that he was in any way harmed by the delay.

Conclusion

For the foregoing reasons, the judgment of conviction against the defendant should, in all respects, be affirmed.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Genesee) ss.:
City of Batavia)

RE: United States
vs
Edward Carlton

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 22nd day of June, 19 76 I mailed _____ copies of a printed Brief & in Appendix the above case, in a sealed, postpaid wrapper, to:

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U.S. Court House
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Richard J. Arcara, U.S. Attorney Att: Edward J. Wagner, Asst. U.S. Attorney

United States Court House, Buffalo, New York 14202

Sworn to before me this

22nd day of June, 19 76

A. GERALD KLEPS
NOTARY PUBLIC, State of N. Y., Genesee County
My Commission Expires March 30, 1977